

boundaries

A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

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Supreme Court Dodges Open and Obvious Issue for Contractors

By Mark Masters

On July 14, 2004, the Michigan Supreme Court handed down its long awaited decision in the case of *Fultz v. Union Commerce Associates, et al*, __ Mich __ (2004). In *Fultz*, Plaintiff sued CML, a snow removal contractor, for injuries she sustained in a slip and fall accident on an icy parking lot which CML had contracted to salt. At trial, the jury found that CML did not breach its contract, but also found that it was negligent for failing to perform under the contract and that CML's negligence was a proximate cause of Plaintiff's injuries.

The Court of Appeals affirmed the verdict in a controversial decision. The Supreme Court then accepted CML's appeal to decide two issues: (1) whether Plaintiff could establish a duty owed to her arising from a contract to which she was not a party, and (2) whether a landowner's defenses (such as the open and obvious defense) were available to a contractor acting for the landowner.

Plaintiff did not allege that she was a third-party beneficiary to the contract, nor did she claim that any statute or ordinance imposed a duty on CML to maintain the parking lot where she was injured. She simply alleged that CML, by contracting to plow and salt the parking lot, owed a common-law duty to her to exercise reasonable care in performing its contractual duties. Plaintiff further alleged that CML had voluntarily assumed a duty, and was therefore liable to her for negligently performing that duty.

The Court moved away from the line of cases distinguishing between non-performance of a contractual duty and the negligent performance of a contractual duty, believing the core of the reasoning in those cases to be a "slippery

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This decision has been anxiously awaited in hopes that it would resolve the split of authority from different panels of the Court of Appeals on the issue of whether or not contractors can avail themselves of the open and obvious defense. The Supreme Court's failure to address the issue leaves the lower courts to struggle with the issue.

Strangely, this very issue was ruled upon in a published decision of the Court of Appeals in *Ghaffari v. Turner Construction*, 259 Mich App 608 (2003). Because the *Ghaffari* decision was published, it has been binding on all subsequent panels of the Court of Appeals and the trial courts. However, the decision has been ignored by several recent panels of the Court of Appeals which have ruled against contractors on this issue. None of the rulings against contractors have been published, and are therefore not binding on the lower courts.

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distinction.” Instead, the Court held that the proper threshold question in this analysis is whether Defendant owed a duty to Plaintiff that was separate and distinct from Defendant’s contractual obligations. “If no independent duty exists, no tort action based on a contract will lie.”

In this case, Plaintiff claimed CML breached its contract with the landowner by failing to perform its contractual duty of plowing or salting the parking lot. She failed to allege any duty owed to her independent of the contract. Therefore, Plaintiff failed to satisfy the threshold requirement of establishing a duty that CML owed to her under the “separate and distinct” approach set forth in the Court’s opinion.

The Court explained that a person would still have a cause of action for negligence against a contractor under the “separate and distinct” approach if the contractor breached a duty separate and distinct from its contractual duties. For example, if a snow removal contractor created a new hazard by placing snow where it would melt and re-freeze on a high traffic area, such as a sidewalk.

“To summarize, if Defendant fails or refuses to perform a promise, the action is in contract. If Defendant negligently performs a contractual duty or breaches a duty arising by implication from the relation of the parties created by the contract, the action may be either in contract or in tort. In such cases, however, no tort liability arises for failing to fulfill a promise in the absence of a duty to act that is separate and distinct from the promise made.”

Reversing the Court of Appeals and finding in favor of CML, the Court held that CML owed no contractual nor common law duties to the Plaintiff to plow or salt the parking lot. Unfortunately, since this issue was dispositive, the Court “did not reach the second [and more important] question regarding defenses,” i.e., whether the open and obvious defense was available to contractors.

CONTACT US

Farmington Hills

30903 Northwestern Highway, P.O. Box 3040
Farmington Hills, MI 48333-3040
Tel: 248-851-9500 Fax: 248-851-2158

Mt. Clemens

94 Macomb Place, Mt. Clemens, MI 48043-5651
Tel: 586-465-7180 Fax: 586-465-0673

Lansing

6639 Centurion Drive, Ste. 130, Lansing, MI 48917
Tel: 517-886-1224 Fax: 517-886-9284

Grand Rapids

1550 East Beltline, S.E., Ste. 305, Grand Rapids, MI 49506-4361
Tel: 616-285-0143 Fax: 616-285-0145

Champaign, IL

2919 Crossing Court, Ste. 11, Champaign, IL 61822-6183
Tel: 217-378-8002 Fax: 217-378-8003

www.secrestwardle.com

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CONTRIBUTORS

Premises Liability Practice Group Chair

Mark F. Masters

Editor

Carina Carlesimo

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